Supreme Court, U. S.
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In The

# Supreme Court of the United States

October Term, 1978

No..... 78-474

THE PRINCETON
COMMUNITY PHONE BOOK, INC.,
and JOSEPH M. BOYD,

*Petitioners*

*v.*

Frank L. BATE, Esq., Blane E. CAPEHART, Esq., Bernard FEINBERG, Esq., Theodore W. GEISER, Esq., William J. HUGHES, Esq., Victor R. KING, Esq., Howard G. KULP, Jr., Esq., Abram A. LEBSON, Esq., Robert O'HERN, Esq., Everett M. SCHERER, Esq., Seymour T. SMITH, Esq., Edward L. C. VOGT, Esq., Edward L. WEBSTER, JR., Esq., and T. Girard WHARTON, Esq., Individually and as Members of the Advisory Committee on Professional Ethics of the New Jersey Supreme Court,

*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

John W. Boyd, Esq.
Freedman, Boyd and Daniels
505 Roma, N.W.
Albuquerque, New Mexico 87102

Harvey Weissbard, Esq.
Isles, Newman and Weissbard
Montclair, New Jersey

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*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, The Princeton Community Phone Book, Incorporated, and Joseph M. Boyd, pray that a writ of certiorari issue to review the opinion and judgement of the Third Circuit Court of Appeals of the United States rendered in these proceedings on June 23, 1978.

## OPINIONS BELOW

*Third Circuit Court of Appeals:* The Opinion of the Court of Appeals for the Third Circuit is not yet reported and is set forth herein as Appendix A (pp.1-29)

*District Court for the District of New Jersey:* The unpublished opinion of the District Court, Honorable Judge George H. Barlow, is set forth herein as Appendix B (pp.30-40)

## JURISDICTION

The jurisdiction of this Court is invoked under Title 28 United States Code Section 1254 (1) to review a decision of the Court of Appeals for the Third Circuit entered on June 23, 1978.

## QUESTIONS PRESENTED

1) Whether the Court of Appeals for the Third Circuit erred in granting *Parker v. Brown*[1] immunity from the anti-trust laws to certain members of the New Jersey Bar who, as appointed members of the Advisory Committee on Professional Ethics of the New Jersey Supreme Court (hereinafter "ACPE"), blacklisted petitioners' independent telephone directories while conferring a publishing monopoly upon petitioners' direct competitior New Jersey Bell, despite the fact that this anticompetitive act was neither compelled nor contemplated by any rule of the New Jersey Supreme Court, and further,

whether the Third Circuit Court of Appeals thereby nullified this Court's holdings in *Parker v. Brown,* 317 U.S. 341 (1943); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *Cantor v. Detroit Edison,* 428 U.S. 579 (1976);

1. 317 U.S. 341 (1943)



*Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) and *City of Lafayette v. Louisiana Power and Light,* ____U.S.____98 S.Ct.1123(1978), insofar as these decisions require that, for immunity from the anti-trust laws to be found, the subject anticompetitive activity must be mandated by the sovereign.

2) Whether the district court erred in ruling that respondents, as appointees of the New Jersey Supreme Court, are clothed with absolute judicial immunity from damage claims, (an issue addressed but not decided by the Court of Appeals);

3) Whether, after the district court had clothed respondents with absolute judicial immunity, and with untried material issues of fact still in controversy, the court of appeals erred in finding as a fact that respondents had acted in good faith and are therefore, with or without absolute judicial immunity, immune to petitioners' damage claim brought under 42 U.S.C. 1983; and

4) Whether the district court erred in dismissing petitioners' Sherman Act claims for lack of subject matter jurisdiction (an issue raised before the court of appeals but not addressed in its opinion)[2].

2. Petitioners' state anti-trust claim was dismissed by the district court for lack of pendent jurisdiction when the district court dismissed all of petitioners' federal claims. In addition, petitioners' motion for summary judgment on their federal anti-trust claim was denied by the district court. Both of these issues were argued before the Third Circuit Court of Appeals. Petitioners do not wish to abandon them and respectfully suggest that this Court's action on other issues raised in this Petition will be dispositive of the issues set forth in this footnote.

## PROVISIONS INVOLVED

*United States Code Title 15, Section 1:*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

*United States Code Title 15, Section 15:*

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

*United States Code Title 42, Section 1983:*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.



## RULES OF THE NEW JERSEY SUPREME COURT

**Rules of General Application:**

*Rule 1:19. ADVISORY COMMITTEE ON PROFESSIONAL ETHICS (cited in pertinent part)*

*1:19-1. Appointment and Organization:*

The Supreme Court shall appoint an advisory committee on professional ethics consisting of 15 members of the bar serving for terms of 3 years with the terms of 5 members expiring each year. A vacancy occurring during a term shall be filled for the unexpired portion thereof. The court shall annually designate a member of the committee to serve as chairman. The Administrative Director of the Courts shall serve as secretary of the committee.

*1:19-2. Jurisdiction*

The committee shall accept inquiries only from the state bar association, from any county or local bar association, or from any member of the New Jersey bar, concerning proper conduct for a member of the legal profession under the Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association as amended by the Supreme Court and other rules of this court governing the practice of attorneys. It shall not consider an inquiry involving a pending action where its opinion might affect the interests of the parties, and it may decline to accept any inquiry without stating its reasons therefor.

*1:19-6. Effect of Published Opinions*

Published opinions of the committee shall be binding upon the Ehtics Committee in their disposition of all matters.

*1:19-7. Procedure*

The committee shall, subject to the approval of the Supreme Court, determine the methods and procedure to be followed in considering inquiries and expressing opinions.

*1:19-8. Petitions for Review*

[Note: The provisions of this rule are not cited here because (1) the rule was not promulgated until 1977, two years after commencement of the subject litigation and (2) because the rule in any case may be invoked only by "any aggrieved member of the bar, bar association or ethics committee". ]

**Disciplinary Rules:**

*DR 2-102. Professional Notices, Letterheads, Offices, and Law Lists [cited in pertinent part]*

(A) A lawyer or law firm shall not use professional cards, professional announcements cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides, and in the city directory of the city in which his or the firm's office is located; but the listing may give only the name of the lawyer or law firm, the fact he is a lawyer, addresses, and telephone numbers. The listing shall not be in distinctive form or type. A law firm may have a listing in the firm name separate from that of its members and associates. The listing in the classified section shall not be under a heading or classification other than "Attorneys" or "Lawyers," except that additional headings or classifications descriptive of the types of practice referred to in DR 2-105 are permitted.



## STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked pursuant to Title 28, United States Code, Section 1343 (3) and Title 28, United States Code, Section 1337, petitioners having alleged a violation by respondents of 15 United States Code, Section 1 (Sherman Act) and Title 42, United States Code, Section 1983 (Civil Rights). The district court's pendent jurisdiction was invoked with respect to a claim under New Jersey Statutes Annotated 56:9-10(b) and 56:9- 12(a) (State anti-trust).

Petitioners (plaintiffs and appellants below) are a corporation and its owner who annually publish a telephone directory serving Princeton, New Jersey and environs. Petitioners' telephone directories, which list in their white alphabetical pages substantially all Princeton area telephone subscribers and which contain also a classified yellow pages section, are distributed free of charge to substantially all residences and offices in the Princeton area, petitioners' income being derived from the sale of yellow pages classified advertising and professional listings. In direct competition with petitioners' telephone directories, as to both yellow pages revenue and readership, are the Princeton and Suburban Trenton telephone directories of New Jersey Bell Telephone Company. In the words of respondents, petitioners' telephone directory is "not unlike the directory published and distributed by the New Jersey Bell Telephone Company" (*Opinion 290,* Appendix C, page 41).

Respondents are practicing members of the New Jersey Bar who were appointed by the New Jersey Supreme Court to serve part time as members of the ACPE. By the provisions of New Jersey Supreme Court Disciplinary Rules, *supra,* the ACPE may in its sole discretion issue opinions answering any inquiry submitted by a member of the New Jersey Bar or by any local New Jersey Bar Association and opinions of the ACPE are binding upon local ethics committees in the conduct of their disciplinary

proceedings. However, in the words of the New Jersey Supreme Court, "an opinion of the Advisory Committee on Professional Ethics. . . .does not bear the approval of this Court. . . ." *Higgins v. Advisory Committee* 73 N.J. 123, 373,A2d 372, 374 (1977).

In 1973, petitioners' Princeton Community Phone Book discontinued its prior policy of listing local professional people, including lawyers, without charge in its classified pages (while continuing to list such professionals free of charge in its white alphabetical pages) and subsequently published paid classified listings of lawyers, along with paid classified listings of doctors, dentists and other professionals, in its 1974 and 1975 issues (published, respectively, in October, 1973 and October, 1974).

In response to an inquiry on behalf of the Princeton Bar Association, the ACPE, in October, 1974, published its *Opinion 290* (Appendix "C") which, relying on New Jersey Supreme Court Disciplinary Rule DR 2-102 (A) 5, *supra,* page 6, banned the purchase of classified listings by lawyers in petitioners' Princeton Community Phone Book yellow pages, while implicitly permitting lawyers to continue purchasing identical classified listings in the yellow pages of petitioners' direct competitor New Jersey Bell Telephone Company.

Publication of *Opinion 290* resulted in immediate cancellation of lawyers' paid classified listings in petitioners' yellow pages, following which petitioners elected to list local lawyers free of charge in its 1976, 1977 and 1978 yellow pages, respectively.

Promptly after publication of *Opinion 290,* petitioner Boyd formally requested respondents to reconsider *Opinion 290* and to afford him a hearing on the matter but both requests were denied by respondents on January 22, 1975. On May 22, 1975, petitioners filed suit.



After affidavits, answers to interrogatories, and depositions had been filed, the district court in an unpublished opinion (Appendix B, pp.30-39) granted respondents' motion for summary judgment and dismissed all petitioners' claims under 42 United States Code 1983 and the Sherman Act, holding, *inter alia,* that respondents are clothed with absolute judicial immunity from damages under 42 United States Code 1983 and that the Court is without jurisdiction to determine the Sherman Act claim for lack of subject-matter jurisdiction. The Court dismissed petitioners' state antitrust claim, holding that pendent jurisdiction would be inappropriate when all federal claims had been dismissed. Accordingly, petitioners' motion for partial summary judgment was denied.

Petitioners appealed to the Third Circuit Court of Appeals, which reversed in part the judgment of the district court and granted petitioners injunctive relief by declaring *Opinion 290* unconstitutional, not as a violation of the Fourteenth Amendment but as a violation of the First Amendment pursuant to this Court's holding in *Bates, supra.* At the same time, the Third Circuit affirmed the decision of the district court in its denial of all petitioners' damage claims under 42 United States Code, Section 1983 and 15 United States Code, Sections 1 and 15.

In affirming the district court's denial of petitioners' damage claims, the Court of Appeals held, *inter alia,* that:

1) Respondents are immune from suit under the Sherman Act because of their close relationship to the New Jersey Supreme Court and because the New Jersey Supreme Court had contemplated *some* activity on their part in the field of lawyers' advertising, even if it had not contemplated the anticompetitive act which gave rise to the case at bar. The Court held that the closer a person is to the sovereign, the less specific the State

"mandate" required by the *Parker v. Brown, supra,* doctrine must be.

2) The Court need not reach the issue of respondents' claimed absolute judicial immunity since, even under the alternative "qualified immunity" standard, respondents clearly acted in good faith because they "could have reasoned that the distinction between a telephone directory published by a public utility. . and a publication. . .published by a corporation not subject to state regulation. . .does not entail a suspect classification." (Appendix "A", page 13).[3] Further, the Court held that petitioners had failed to controvert, for the purposes of summary judgment, identical affidavits of respondents that they had acted in good faith. In so holding, the Court failed to reach the issues of subject matter jurisdiction under the Sherman Act, as well as the issue of absolute judicial immunity.

## REASONS FOR ALLOWING THE WRIT

Petitioners respectfully submit that, for reasons which follow, this Court's response to each of the questions presented to it herein will have far-reaching effects on business and professional relationships generally and in particular on the conduct of state-sponsored trade and professional self-regulation boards.

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3. Although telephone directories published by both petitioners and New Jersey Bell contain substantially complete alphabetical "white pages" listings of local Princeton telephone subscribers, the subject matter of the case at bar concerns the yellow classified pages of petitioners' and New Jersey Bell's competing telephone directories, such yellow pages being unregulated commercial advertising ventures, whether published by utility companies like New Jersey Bell or by independent publishers like petitioners.



*1) If respondents are granted "Parker v. Brown" immunity against petitioners' Sherman Act damage claims, the door will be open for respondents and other similarly situated public officials, at their pleasure, to license or boycott business people by name and otherwise determine who in the business community shall be privileged and who shall not be privileged to serve individual members of any state-regulated trade or profession.*[4]

In the clear absence of any legislative or judicial mandate or indication to license or boycott telephone directories or to grant a monopoly of any kind to any telephone directory publisher[5], respondents, in their capacity as members of the Advisory Committee on Professional Ethics of the New Jersey Supreme Court, conferred upon New Jersey Bell the exclusive license to sell Yellow Pages classified listings to members of the New Jersey Bar in Princeton, New Jersey and vicinity, the area also served by petitioners' Princeton Community Phone Book (*Opinion 290,* Appendix pp. 41-42 and Third Circuit Opinion, Appendix pp.5-6).

Petitioners respectfully submit that the opinion of the Third Circuit in granting respondents *Parker v. Brown* immunity from petitioners' Sherman Act claim is in direct conflict with *Parker v. Brown, supra,* and with recent decisions of this Court in *Goldfarb v. Virginia State Bar, supra, Cantor v. Detroit Edison Co., supra, Bates v. State Bar of Arizona, supra,* and *City of Lafayette v. Louisiana Power & Light Co., supra.*

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4. New Jersey has at least twenty-three boards, in addition to the ACPE, consisting of state-appointed business and professional people (ranging from accountants and beauticians through shorthand reporters and veterinarians), who regulate the business or professional conduct of their respective colleagues in commerce.

5. If anything, the Disciplinary Rule in point, *supra*, page 6, mandated a result opposite to the result reached by the respondents in *Opinion 290.*

In those cases, this Court held, repeatedly, that an anticompetitive activity, to be immune from scrutiny under the Sherman Act, must be compelled by the state acting as sovereign. *Parker, supra,* at 350; *Goldfarb, supra,* at 790; *Bates, supra,* at 359-63; *Cantor, supra,* at 600; *City of Lafayette, supra,* 98 S.Ct. at 1137.

While acknowledging this point, the Third Circuit promulgated as follows a novel test of the liability of state appointed committee members to Sherman Act claims:

> "The weaker the relationship between the state and the defendant, the more clearly the state must command the precise action taken by the defendant for the defendant to enjoy the state action exemption. Conversely, the closer the relationship between the state and the defendant, the less clearly the state need command the precise action for the defendant to enjoy the exemption." (Appendix A, page 26).

Despite, the absence of any approval of ACPE opinions by the New Jersey Supreme Court, the Third Circuit nevertheless found respondents, as members of the ACPE, to be, in essence, "sovereign" within the meaning of *Parker v. Brown, supra.*

This Court anticipated and attempted to prevent such an unfortunate result when it said, in *Cantor, supra,* that unless a line is drawn between the actual sovereign and all others,

> ". . .a host of state regulatory agencies [may receive] broad power to grant exemptions from an important Federal law for reasons wholly unrelated either to Federal policy or even to any necessary significant state interest." *Cantor, supra,* at 603.



A central question of public importance raised in the case at bar is whether private business and professional interests, by participating in governmental self-regulation boards with authority delegated by a state supreme court, legislature or governor, are to be imunized from exposure to federal and state anti-trust laws.

*2) If respondents, because they are judicial appointees, are granted absolute judicial immunity from 42 U.S.C. 1983 damage claims by injured citizens, the practical effect will be to exempt all judicial appointees from the purview of 42 U.S.C. 1983.*

As observed in the Third Circuit Opinion (Appendix page 12):

> "Neither the Supreme Court nor this Circuit has been confronted with the issue of whether the doctrine of absolute immunity should be extended to members of a committee such as this one, appointed by a state supreme court, when exercising this discretionary power to issue advisory opinions."

The district court determined that respondents are clothed with absolute judicial immunity (Appendix B, pp. 32-33). The court of appeals avoided the issue by determining that under either standard of immunity - qualified or absolute - respondents are not liable for damage to petitioners since they acted in good faith (Appendix A, page 19). Thus, the district court's determination that respondents' immunity is absolute stands uncontroverted.

If this court grants this Petition and if petitioners are found correct in their view that the court of appeals erred in *sua sponte* granting respondents summary judgment on the issue of their good faith, then the issue of absolute judicial immunity is presented.

The district court reasoned that because the defendants derive their authority from the rules of the New Jersey Supreme Court; because they provide assistance to the Supreme Court; and because they are therefore an integral part of the judicial process, they are absolutely immune from damages.

Petitioners respectfully submit that this rationale runs counter to this Court's holdings in *Stump v. Sparkman,* ____U.S.____, 46 U.S.L.W. 4253 (1978) and *Pierson v. Ray,* 386 U.S. 547 (1967) insofar as it extends absolute immunity to persons who are (a) not judges; (b) not engaged in a judicial function; and (c) not engaged in a function imbued with the public policy considerations which fostered the doctrine of judicial immunity.

Respondents' claim to absolute judicial immunity, if allowed to stand, with respect to respondents' role in regulating the legal profession, raises a further question as to whether appointees of a state governor or a state legislature or legislative committee are also entitled to absolute immunity from 42 U.S.C. 1983 damage claims - especially damage claims arising from the promulgation of regulatory rulings affecting the medical or dental professions or other trade or professional groups or their suppliers.

*3) The Third Circuit has established a precedent which, if permitted to stand, will effectively eliminate claims for damages under 42 U.S.C. 1983 except in those situations in which bad faith is admitted.*

In the district court, defendants moved for summary judgment as to all of plaintiffs' claims. On the issue of the



claim for damages under 42 United States Code 1983, the defendants each submitted an identical affidavit which stated that the affiant acted in good faith, exercised his discretion reasonably and did not deprive the plaintiffs of their constitutional rights. Defendants' motion for summary judgment on the issue of damages under 42 United States Code 1983 was not ruled upon by the district court and was not briefed by either side in the court of appeals.

Nevertheless, and despite substantial evidence to the contrary, *infra,* (pp. 16-18) the Third Circuit took it upon itself to determine as a matter of law that respondents had acted in good faith. Its rationale was that since *Opinion 290* had been adopted prior to this Court's decision in *Bates v. State of Arizona, supra,* respondents "Could not have known that their action was unconstitutional." (Appendix A, page 12).

It should be noted, however, that petitioners' claims in the trial court were not based upon the First Amendment but upon petitioners' Fourteenth Amendment right to sell their own yellow pages listings under the same rules as applied to their direct competitors' sale of identical yellow pages listings.

As to petitioners' Fourteenth Amendment claims, the Third Circuit simply stated its finding that respondents "could have reasonably believed that *Opinion 290* did not violate plaintiffs' right to equal protection" and "could have reasoned" that the distinction drawn by them between two admittedly like and competing telephone directories did not "entail a suspect classification or any other classification requiring a degree of scrutiny more rigorous than determining whether the classification has a rational basis and is related to a legitimate state interest" (Appendix A, page 13), concluding by implication that respondents did indeed subject their *Opinion 290 to sufficient* scrutiny to determine that it had a rational basis and

was related to a legitimate state interest—a conclusion with no basis in the record.

Despite the fact that, in the context of a summary judgment, there was no evidence whatever that respondents acted in good faith (other than their bare assertions to that effect) or that they were entitled to ignore petitioners' demands for equal protection, the court of appeals granted them summary judgment on its own initiative. It did so even though respondents' act had been an obvious violation of the Equal Protection Clause at the time it was adopted. *Royster Guano Co. v. Virginia,* 253 U.S. 412 (1920).

This Third Circuit decision, then, attempts substantially to alter this Court's holdings in *Procunier v. Navarette,* ____U.S.____, 98 S.Ct. 855 (1978); *Wood v. Strickland,* 420 U.S. 308 (1975) and all of their precedessor opinions in that:

a) It holds in essence that the law of equal protection is in flux and incapable of being known by lawyers; and

b) All reasonable inferences are to be drawn in favor of the public official who moves for summary judgment on the issue of good faith.

Another trier of fact, confronted with the following disclosures in the record, might well have reached less favorable conclusions as to respondents' good faith in adopting and publishing *Opinion 290:*

1) The chairman of the subcommittee of the Advisory Committee on Professional Ethics which promulgated *Opinion 290* and urged its adoption by the entire Committee was at that time an attorney for New Jersey Bell and American Telephone and Telegraph Company;



2) Petitioner Boyd's request to be heard by respondents was turned down because he threatened court action;

3) Respondents admitted that they found particularly objectionable the fact that Petitioners had commenced charging a fee to members of the bar for classified listings that petitioners had previously furnished free of charge[6];

4) Before adopting *Opinion 290,* some respondents never bothered to look at a copy of petitioners' telephone directory while others were admittedly aware that The Princeton Community Phone Book's content and format were indistinguishable from the content and format of New Jersey Bell's competing directories;

5) The respondents are all lawyers and as such can reasonably be expected to know the law and the rights of ordinary citizens;

6) Respondents failed to withdraw *Opinion 290* until more than a year after publication of this Court's decision in *Bates, supra;*

*7) Respondents did not adopt Opinion 290 for the reasons stated in that opinion as published.*[7]

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6. The Third Circuit "found" (Appendix page 17) that this consideration was not a factor in the adoption of *Opinion 290.* However, the chairman of the ACPE subcommittee which drafted the opinion stated unequivocally in the record that petitioners' policy of charging fees for lawyers' classified listings was a principal factor leading to promulgation of *Opinion 290* - despite the fact that lawyers, along with other professional people, customarily paid for similar yellow page listings in New Jersey Bell directories.

7. Whereas depositions of respondents disclose that their actual purpose in promulgating *Opinion 290* was to define a telephone directory, for the purposed of DR2-102 (A)(5), as a telephone *company*

What is most startling is that an appeals court has entered a summary judgment based, apparently, on affidavits alone in which respondents characterize their motives as pure - a judgment which conflicts with this Court's holding in *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 176 (1970) that "trials by affidavit," especially where motive is in issue, are to be avoided. *See also,* discussion by Judge Gesell in *Miller v. Saxbe,* 403 F. Supp. 1314, 1316 (D.D.C. 1975).

If the Third Circuit's finding of respondents' good faith in the case at bar is allowed to stand, then similar damage claims under 42 U.S.C. 1983 may be expected thereafter to be routinely dismissed on mere protestations of good faith by persons acting under color of state authority.

*4) The district court's decision dismissing plaintiffs' Sherman Act claims for lack of subject matter jurisdiction is in conflict with prior decisions of this Court.*

The district court granted respondents summary judgment on petitioners' Sherman Act claims because the district court saw "the nexus between the defendants' conduct and interstate commerce" as "insufficient as a matter of law to enable us to assume jurisdiction of the Sherman Act claims." (Appendix B, page 37).

7. (Cont'd.)
directory, *Opinion 290,* as published, did not reflect this purpose. Instead, respondents worded *Opinion 290* so as to blacklist petitioners' yellow pages by name as an "ethically not acceptable". . ."advertising directory", although respondents knew full well that New Jersey Bell's competing yellow pages were also an "advertising directory" in every sense in which plaintiffs' yellow pages were an "advertising directory". This inherent contradiction within *Opinion 290* is by itself sufficient to bar a summary finding of respondents' good faith. In the words of Judge Learned Hand, "Good faith is one form of credibility; it means that the motive that actuates the conduct in question was in fact what the actor ascribes to it: i.e., that what he gives as his motive was in truth his motive," *National Labor Relations Board v. James Thompson & Co.* 208 F.2d. 743, 745 (2nd cir. 1953).



The court of appeals failed to reach the jurisdiction issue, since it determined that the defendants were immune from the provisions of the Sherman Act in any event. If this Court acts favorably on this petition and determines that the *Parker v. Brown* immunity of respondents is in question, then the issue of subject-matter Sherman Act jurisdiction is presented.

Petitioners' telephone directory contains numerous advertisements of out-of-state businesses and also advertisements offering products in the flow of interstate commerce. Petitioners buy most of their materials and printing services outside the state of New Jersey and publish their directories in direct competition with directories of New Jersey Bell Telephone Company, which has similar and more extensive contacts with interstate commerce.

The decision of the district court ignores and violates this Court's holding in *Lorain Journal v. United States,* 342 U.S. 143 (1951) in which this Court determined that even when there is a purely local act which may not in itself substantially affect interstate commerce, the court should inquire into the nature of the market affected. Here, the market, as in the case of the Lorain Journal's attempt to blacklist a local advertising medium, is an interstate market and petitioners are therefore entitled to invoke Sherman Act jurisdiction, even if the amounts involved may be small. The district court's decision seems particularly inappropriate in the context of a motion for summary judgment. Since the jurisdictional allegations and affidavits of petitioners formed the only basis for the district court's decision, the case at bar is remarkably similar to *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738 (1976), in which this Court held a similar decision by a district court incorrect when markedly similar allegations were in issue.

It is pertinent to note in this connection that the act of

respondents - if it is permitted to escape Sherman Act scrutiny - may well have a profound impact on interstate commerce in that respondents and other similarly situated public officials would thereby be permitted to engage with impunity in wholesale restraints of trade by licensing all advertising media, including telephone directories, now that in *Bates, supra,* this Court has held lawyers' advertising (and by implication other professional advertising) permissible but also subject to official regulation. The only restraint upon such officials would then be actions under 42 U.S.C. 1983 which, as the result in this case would tend to indicate, provide little or no protection for persons whose livelihoods are damaged by similar acts.

Furthermore, it should be noted that anticompetitive acts of respondents and other similarly situated officials may not necessarily involve publishing activities and may therefore not be subject to collateral restraints in the form of First Amendment guarantees.

## CONCLUSION

For the reasons stated above, this Petition presents the Supreme Court with an opportunity not only to correct a significant erroneous decision by a court of appeals but also to clarify and provide needed reinforcement of its previous holdings on the following important and timely subjects:

1) Immunity of public officials from the reach of the Sherman Act;

2) Availability of absolute judicial immunity to officials other than judges;

3) The procedural and factual requisites for summary findings of good faith on the part of persons acting under color of state authority; and

4) Subject-matter jurisdiction under the Sherman Act.



Each of these subjects has been narrowly presented by both sides in the proceedings leading up to this Petition.

WHEREFOR, Petitioners respectfully pray this honorable Court grant this Petition and issue its writ of Certiorari in the above cause to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JOHN W. BOYD
Freedman, Boyd and Daniels
Attorney for Petitioners
505 Roma, N.W.
Albuquerque, New Mexico 87102
(505) 842-9960

HARVEY WEISSBARD
Isles, Newman and Weissbard
Attorneys for Petitioners
Montclair, New Jersey

# Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Third Circuit

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No. 77-2032

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THE PRINCETON
COMMUNITY PHONE BOOK, INC.
and JOSEPH M. BOYD,

*Appellants*

*v.*

Frank L. BATE, Esq., Blane E. CAPEHART, Esq., Bernard FEINBERG, Esq., Theodore W. GEISER, Esq., William J. HUGHES, Esq., Victor R. KING, Esq., Howard G. KULP, Jr., Esq., Abram A. LEBSON, Esq., Robert O'HERN, Esq., Everett M. SCHERER, Esq., Seymour T. SMITH, Esq., Edward L. C. VOGT, Esq., Edward L. WEBSTER, JR., Esq., and T. Girard WHARTON, Esq., Individually and as Members of the Advisory Committee on Professional Ethics of the New Jersey Supreme Court

(D.C. Civil No. 75-881)

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Appendix 2

Appeal From The United States District Court For The District of New Jersey

George H. Barlow, District Judge

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Argued March 31, 1978

Before Adams, Van Dusen and Rosenn, *Circuit Judges*

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Norman R. Bradley, Esq.,
Saul, Ewing, Remick & Saul,
Philadelphia, Pa.
and
John W. Boyd, Esq.,
Freedman, Boyd and Daniels,
Albuquerque, New Mexico,
and
Harvey Weissbard, Esq.,
Isles, Newman and Weissbard,
Montclair, New Jersey
Attorneys for Appellants

William F. Hyland, Esq.,
Attorney General of New Jersey and
Paul G. Levy, Esq.,
Assistant Attorney General,
Trenton, New Jersey
Attorneys for Appellees

Appendix 3

## OPINION OF THE COURT

(Filed June 23, 1978)

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Van Dusen, *Circuit Judge.*

This appeal raises a number of issues concerning Opinion 290 of the Advisory Committee on Professional Ethics of the New Jersey Supreme Court, prohibiting members of the New Jersey Bar from paying the Princeton Community Phone Book, Inc. to list their names, addresses and telephone numbers in the classified section of its publication. Plaintiffs sued claiming that, by adoption of Opinion 290, the defendants injured them by (a) depriving them of their constitutional rights,[1] in violation of 42 U.S.C. Section 1983,[2] and (b) by restraining competition among publishers of telephone books, in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1).[3] In ruling

1. In the district court plaintiffs alleged that Opinion 290 violated their right to equal protection under the Fourteenth Amendment. On appeal, plaintiffs argue that Opinion 290 violates their First Amendment rights under *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), which had not been decided at the time of the district court's ruling. Because the First Amendment issue is of great public interest and because the parties did not have the benefit of the *Bates* decision in the district court, we will consider this argument even though it was not raised in the district court. *Rogers v. Larson,* 563 F.2d 617, 620 n.4 (3d Cir. 1977); *Franki Foundation v. Alger-Rau Associates, Inc.,* 513 F.2d 581, 586 (3d Cir. 1975).

2. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. There was also a pendent state claim under New Jersey antitrust laws.

on the parties' motions for summary judgment, the district court held that plaintiffs' claim for injunctive and declaratory relief under Section 1983 was moot, that defendants were absolutely immune to a damage action under Section 1983, and that the nexus between defendants' conduct and interstate commerce was insufficient to establish jurisdiction under the Sherman Act. We reverse in part and affirm in part. Specifically, we hold that the claim for injuctive and declaratory relief is not moot, that Opinion 290 is unconstitutional, that the defendants are immune from a Section 1983 damage action under the qualified immunity standard, and that the Sherman Act claim is barred by the *Parker v. Brown*[4] state action exemption.

## I.

### FACTS and PROCEDURAL HISTORY

Plaintiffs, The Princeton Community Phone Book, Inc. and its principal owner, Joseph M. Boyd, annually publish a telephone directory and distribute it to homes and offices in the Princeton, New Jersey, area. The corporation derives its income from charging a fee for listings and advertisements in its classified yellow pages. The Princeton Community Phone Book is "not unlike the directory published and distributed by the New Jersey Bell Telephone Company." Opinion 290 at 17a. [*Appendix "C" herein*].

4. 317 U.S. 341 (1943).



The defendants are or were members of the Advisory Committee on Professional Ethics of the New Jersey Supreme Court (hereinafter referred to as the Committee). The Committee members are appointed by the New Jersey Supreme Court and the Committee may issue opinions answering any inquiry submitted by a member of the New Jersey bar or by a local bar association. The Committee's published opinions are binding on local ethics committees. Under its discretionary powers, the Committee may decline to answer an inquiry without stating reasons. N.J. Court Rules 1:19..

In 1973 The Princeton Community Phone Book discontinued its prior policy of listing professionals without charge in its yellow pages and published paid listings of lawyers in its yellow pages in the 1974 and 1975 editions.[5] In response to an inquiry on behalf of the Princeton Bar Association, The Committee, in October 1974, published Opinion 290, which stated in part: "It is the opinion of the Committee that the purchase of a classified listing in an advertising directory (such as the Princeton Community Phone Book) is not ethically acceptable." 19a. In the Opinion the Committee cited DR-102(A)(5) of the New Jersey Supreme Court Disciplinary Rules, which is identical with the same numbered provision of the American Bar Association Code of Professional Responsibility, and states:

> "A lawyer or law firm shall not use . . . telephone directory listings . . . except that the following may be used if they are in dignified form: . . . A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides, and in the city directory of the city in which his or the firm's office is located. . . ."

5. These editions were actually published in 1973 and 1974, respectively. White page listings for all editions were free of charge.

Thus, the Committee interpreted "the telephone directory or directories" to mean the directories published by the telephone company.[6] On January 22, 1975, the Committee declined plaintiffs' request to reconsider the Opinion and so notified plaintiffs. Plaintiffs then filed suit.

On April 22, 1976, almost a year-and-a-half after the publication of Opinion 290, the Committee published a notice suspending the effect of the Opinion pending the possible revision of the Disciplinary Rules by the New Jersey Supreme Court. The notice stated that the Committee would reconsider the Opinion after any such revisions.[7] After publication of this notice, plaintiffs unsuccessfully attempted to solicit lawyers to purchase listings in the Princeton Community Phone Book. Pending the outcome of this case, the Princeton Community Phone Book, Inc. is continuing free classified listings of lawyers.

On June 1, 1976, the district court held a pretrial hearing on defendants' motion for summary judgement and plaintiffs' motion for partial summary judgment. The court reserved judgment on the motions pending discovery. Then, on May 31, 1977, after affidavits, answers to interrogatories, and depositions had been filed, the court granted defendants' motion for summary judgment.[8] This appeal followed.

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6. See note 7, *infra.*

7. At the district court's hearing on the parties' motions for summary judgment, counsel for the defendants stated that the Committee expected the New Jersey Supreme Court to revise DR 2-102(A) (5) to define "telephone directory" as "telephone company directory," in effect adopting the Committee's interpretation of that Disciplinary Rule in Opinion 290. 178-79a. No such revision has been made.

8. The district court's unpublished opinion is reproduced at 346a. The court also dismissed plaintiffs' pendent state claim for lack of jurisdiction.



## II.

### INJUNCTIVE and DECLARATORY RELIEF UNDER SECTION 1983

### A. *Mootness*

The district court held that plaintiffs' claim for injunctive and declaratory relief was moot because Opinion 290 had been suspended and was not in effect at the time the district court's decision was rendered. We disagree. Correspondence between attorneys and the Princeton Community Phone Book, Inc., which was made part of the record, establishes that a number of lawyers who had paid for classified listings in the Princeton Community Phone Book cancelled their listings because of Opinion 290. 79-88a. An affidavit by an employee of the Princeton Community Phone Book states that, after the Opinion had been suspended, she contacted lawyers who had purchased listings before the Opinion was promulgated but was unable to convince them to resume purchasing listings.

On a motion for summary judgment, inferences from this material must be viewed in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150 (1970). This evidence clearly raises the inference that Opinion 290, even in its suspended status, had a chilling effect upon the Princeton Community Phone Book, Inc.'s ability to obtain paid listings and upon the lawyers who may have wished to be listed. Furthermore, a party arguing that a case is moot must bear a heavy burden of demonstrating the facts underlying that contention. *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953). Nonetheless, the defendants produced no

evidence whatsoever to demonstrate mootness or to contradict the inference to be drawn from the letters and affidavits filed by plaintiffs. Therefore, we hold that the case is not moot.[9]

B. *The First Amendment*

Turning to the merits of plaintiffs' claim that Opinion 290 violates their constitutional rights, we find *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), controlling. Defendants in *Bates,* two lawyers, published a newspaper advertisement listing their firm name, address, telephone number and fees for a number of routine legal services. They contended that their advertisement, which they admitted violated the American Bar Association Code of Professional Responsibility Disciplinary Rule 2-101(B), incorporated in Rule 29(a) of the Supreme Court of Arizona,[10] was protected by the First Amendment. The Court agreed with this contention and summarized its holding as follows:

9. On appeal defendants argue that *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), decided after the district court's decision, renders this case moot. *Bates* held that the First Amendment prevents states from prohibiting, but not from regulating, advertising by lawyers. See the discussion of *Bates, infra.* There is nothing in the record, however, indicating that lawyers have resumed purchasing listings in the Princeton Community Phone Book since the *Bates* decision. Therefore, in light of defendants' burden of demonstrating mootness, *W.T. Grant, supra,* we reject this argument.

10. 17A Ariz. Rev. Stat. (Supp. 1976), p. 26. DR 2-101(B) provided in part:

"(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf."

This rule has since been amended. See note 11, *infra.*



> "The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment."

*Bates, supra* at 384.

There are two possible grounds for distinguishing *Bates* from the present case. First, the listing here includes less information than the advertisements in *Bates*, as the latter included fee information. Since the potential for deceptive advertisement is thus not present in this case, the argument that the Princeton Community Phone Book listings constitute protected speech is even stronger than the defendants' argument in *Bates*. *See Bates, supra* at 388 (Burger, C.J., concurring in part and dissenting in part), 392-402 (Powell, J., concurring in part and dissenting in part).

The second distinction is that the advertisements in *Bates* were published in a newspaper and the listings here are published in a book of directory. We attach no significance to this distinction and conclude that a listing placed in a book or directory such as we are presented with here is entitled to the same protection as an advertisement placed in a newspaper.[11] Therefore, on the authority of *Bates,* we

11. In *Bates* the Court drew a distinction between the print media and the electronic broadcast media, acknowledging that the latter may warrant special consideration. *Bates, supra* at 384. However, there is no implication in *Bates* that different forms of print media warrant different consideration.

Furthermore, the amendments to DR 2-101(B), enacted in the wake of *Bates,* permit advertising in the print media generally. Before the recent amendments, DR 2-101(B) read as stated in note 10, *supra.* New DR 2-101(B) reads in part:

"In order to facilitate the process of informed selection of a lawyer

hold that Opinion 290 is unconstitutional as violating the First Amendment.[12]

11. (Cont'd)
by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyers' clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR2-105;

* * *

(20) Fee for an initial consultation;
(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
(24) Hourly rate . . .;
(25) Fixed fees for specific legal services . . . ."

12. *See also In re Primus,* 46 U.S.L.W. 4519 (U.S., May 30, 1978). In *Primus* the Supreme Court held that when a lawyer seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of his or her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer is affiliated, the lawyer's conduct is protected under the First Amendment and may not be prohibited by a state's rules against solicitation and publicity.



## III.

### IMMUNITY TO DAMAGES UNDER SECTION 1983

On plaintiffs' claim for damages under Section 1983, the district court granted the defendants' motion for summary judgment on the ground that the individual members of the Committee, when performing Committee functions, enjoy absolute immunity from damage suits under Section 1983.

The Supreme Court has extended absolute immunity to judges, legislators, and prosecutors when they are performing their respective judicial, legislative, and prosecutorial functions.[13] In contrast, other governmental officials enjoy only a qualified immunity shielding them against liability when they act in good faith and reasonably believe their actions are constitutional. Stated differently, to be entitled to such immunity, they must act reasonably and without malice. *Wood v. Strickland,* 420 U.S. 308, 321-22(1975); *Scheuer v. Rhodes,* 416 U.S. 232, 247-48(1974); *Pierson v. Ray,* 386 U.S. 547, 557 (1967). In *Wood, supra* at 323, the Court stated:

12. (Cont'd)
This case is readily distinguishable from *Ohralik v. Ohio State Bar Association,* 46 U.S.L.W. (U.S., May 30, 1978), in which the Supreme Court held that a state "constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the state has a right to prevent." *Id.* at 4520. *Ohralik* "provide[s]" classic examples of 'ambulance chasing,' fraught with obvious potential for misrepresentation and overreaching." *Id.* at 4517 (Marshall, J., concurring). In distinguishing *Bates,* the court in *Ohralik* reaffirmed its validity. *Id.* at 2543.

13. *Tenny v. Brandhove,* 341 U.S. 367 (1951) (legislators); *Pierson v. Ray,* 386 U.S. 547 (1967) (judges);*Imbler v. Pachtman,* 424 U.S. 409 (1976) (prosecutors).

> "(We) held that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of offical responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."

The Supreme Court recently reaffirmed this test in *Procunier v. Navarette,* 46 U.S.L.W. 4144, 4146-47 (U.S., Feb. 22, 1978). Neither the Supreme Court nor this circuit has been confronted with the issue of whether the doctrine of absolute immunity should be extended to members of a committee such as this one, appointed by a state supreme court, when exercising their discretionary power to issue advisory opinions. We find it unnecessary to decide this issue in this case. Assuming, without deciding, that defendants are entitled to only qualified immunity,[14] we conclude that the depositions, interrogatories, and affidavits clearly establish that the defendants acted in good faith and, specifically, that they could not have known that their action was unconstitutional, and further show that there is no genuine issue as to any material facts concerning the defendants' good faith.

The defendants had no reason to believe Opinion 290 violated the First Amendment. Opinion 290 was issued prior to the Supreme Court's decision in *Bates* reversing the Arizona Supreme Court, and the dissenting opinion in *Bates,* joined in by four Justices, demonstrates that defendants could have reasonably believed that Opinion 290 was not violative of the First Amendment.[15]

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14. Plaintiffs' concede, as they must, that defendants are at least entitled to qualified immunity. Brief for appellant at 14.

15. However, as noted above, the case against advertising was stronger in *Bates* than it is here. Nonetheless, plaintiffs' constitutional



Plaintiffs contend that Opinion 290 violates the Equal Protection Clause of the Fourteenth Amendment in that it unreasonably discriminates between the Princeton Community Phone Book and telephone directories published by New Jersey Bell. Having found Opinion 290 unconstitutional on First Amendment grounds, we briefly mention the equal protection issue only to demonstrate that the defendants could have reasonably believed that Opinion 290 did not violate plaintiffs' right to equal protection. The defendants could have reasoned that the distinction between a telephone directory published by a public utility or state-regulated monopoly as an adjunct to telephone service and a publication listing telephone numbers and advertising published by a corporation not subject to state regulation and which derives its income solely from the sale of advertising[16] does not entail a suspect classification[17] or any other classification[18] requiring a degree of scrutiny more rigorous than determining whether the classification has a rational basis and is related to a legitimate state interest.[19] Furthermore, since

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15. (Cont'd)

right to publish the listings was not "clearly established" before *Bates,* and defendants "could not reasonably have been expected to be aware of a constitutional right that had not yet been declared . . . ." *Procunier v. Navarette, supra* at 4147.

16. This is the explanation for the distinction given by the drafter of Opinion 290, Deposition of Blaine E. Capehart at 317a, and by one other member of the Committee, Deposition of Frank L. Bates at 14.

17. *See, e.g., Graham v. Richardson,* 403 U.S. 365, 372 (1971); *Korematsu v. United States,* 323 U.S. 214, 216 (1944).

18. *See, e.g., Craig v. Boren,* 429 U.S. 190, 197 (1976)

19. The classic statement of the rational basis test is found in *Royster Guano Co. v. Virginia,* 253 U.S. 412 (1920), in which the Court said that a classification "must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike." *Id.* at 415. *See also, e.g., Dandridge v. Williams,* 397 U.S. 471, 485 (1970).

the Supreme Court had not conclusively held that purely commercial speech enjoys First Amendment protection at the time Opinion 290 was issued,[20] the defendants could have reasonably believed that no fundamental interest requiring strict scrutiny[21] was at stake. The defendants could have reasoned further that the state has a legitimate interest in regulating advertising by attorney[22] and that a classification preventing the poliferation of advertising

20. Opinion 290 was issued in October 1974, prior to the Supreme Court's decisions in *Virginia Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. 748 (1976), and *Bigelow v. Virginia,* 421 U.S. 809 (1975). In *Virginia Pharmacy Bd.,* the Supreme Court squarely held that the First Amendment reaches purely commercial speech. However, the Court acknowledged that "[t]here can be no question that in past decisions the Court has given some indication that commercial speech is unprotected," *id.* at 758, and recognized that it was not until *Bigelow* that "the notion of unprotected 'commercial speech' all but passed from the scene," *id.* at 759. Furthermore in *Virginia Pharmacy Bd.,* the Court narrowly limited its decision to advertising by pharmacists and expressly stated that it expressed no opinion concerning advertising by other professionals. The Court stated:

> "We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standarized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising."

*Id.* at 748 n25. *Bigelow* was also narrowly limited to its facts, advertisements conveying information concerning the availability of legal abortions in New York. The Court stated: "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." *Id.* at 825 (footnote omitted). Therefore, it would appear that the defendants could not have known that commercial speech was protected in the circumstances of this case until the *Bates* decision.

21. *See, e.g., Police Dept. of Chicago v. Mosley,* 408 U.S. 92 (1972).

22. *Bates, supra* at 383-84.



making the policing of advertising difficult[23] but insuring public access to attorneys' telephone numbers and addresses through the medium traditionally used for that purpose has a rational basis. Of course we make no judgment as to the legal sufficiency of this argument, but we find that it is reasonable and that the defendants could have adhered to it in good faith.

Having found that defendants could not have known that Opinion 290 was unconstitutional, we turn to the issue of whether the Opinion was adopted in good faith or whether it was adopted "with the malicious intention to cause . . . injury." *Wood v. Strickland, supra* at 323. In their Amendment to Answer, Eighteenth Defense, defendands asserted that they "acted reasonably, in light of all circustances, and with malice, but in good faith, within the scope of authority of R.1:19 of the New Jersey Court Rules." 205a. At the hearing on the motions for summary judgment, before any discovery, the district court made clear that good faith or lack thereof would be an important issue in the case. 160a. In response to the court's observation that a good faith defense appeared appropriate, 160-61a, consel for plaintiffs stated: "On that point we would simply have to reserve whatever evidence we could muster. I might point out that any evidence of lack of good faith, I think we would have reason to expect to get through answers to our interrogatories and through depositions. . . ." 162a. The court reserved judgment on the motions and directed the attorneys to continue with discovery. 180a. Thus, the parties were on notice that the issue of good faith should be fully explored during discovery. The decision on the motions was entered after almost a year and a half of discovery.

23. The record indicates that the members of the Committee were concerned about the proliferation of advertising by lawyers. Deposition of Frank L. Bate at 5; Deposition of Blaine E. Capehart at 315a, 323a.

Each of the 12 defendants who participated in the adoption of Opinion 290[24] filed an affidavit stating: "I acted in good faith and exercised my discretion reasonably with regard to Opinion 290 at all relevant times." Docket entry 51, September 22, 1976. This claim is corroborated by uncontradicted testimony in the depositions, which discloses the following facts. When the propriety of paid listings in the Princeton Community Phone Book first was questioned, the Committee, on the recommendation of Part C of the Committee,[25] declined to issue an opinion and referred the lawyer making the inquiry to an earlier opinion. Deposition of T. Girard Wharton at 261a. The attorney resubmitted the request on behalf of the Princeton Bar Association and the entire Committee decided that it should issue an opinion. The inquiry then went back to Part C, and defendant Wharton, chairman of that Part, assigned it to defendant Capehart for a draft opinion. *Id.* at 276a. When Mr. Capehart was assigned the opinion, the Committee had not decided the merits of the inquiry but only had decided to issue an opinion. Mr. Capehart was not told what result the opinion should reach. Deposition of Blaine E. Capehart at 308a. Mr. Capehart then researched the problem, relying on the Code of Professional Responsibility, the prior opinions of the Committee, the informal opinions of the American Bar Association, and a memorandum prepared when the initial inquiry was assigned to Part C.[26] Capehart's draft opinion was approved by Part C and then by the Committee with only minor

24. The pre-trial order stipulated that three defendants, Hughes, Lebson and Webster, did not participate in the decision.

25. For administrative purposes, the Committee is apparently divided into three parts, A through C. Inquiries are assigned to the parts on a rotating basis as they are received. Decisions as to whether to entertain inquiries and draft opinions are approved by the part to which the inquiry is assigned before they are submitted to the Committee as a whole.

26. The memorandum, prepared by Mr. Matyola, an associate in defendant Wharton's law firm, concluded that the initial inquiry



changes. Deposition of Wharton at 276-77a; Deposition of Capehart at 310a. When the Committee discussed the merits of the opinion, the discussion concerned only such topics as the propriety and control of advertising by lawyers and the proper interpretation of DR 2-101(A)(5). Deposition of Capehart at 315a; Deposition of Frank L. Bate at 14. This is confirmed by the deposition of the Assistant Administrative Director of the Courts, who was present at the meeting. Deposition of W. Lewis Bambrick at 18-20. The opinion was apparently adopted by consensus. Deposition of Wharton at 276a; Deposition of Capehart at 320-21a. Three of the four deponets were asked if such factors as protecting the interests of Bell Telephone Company, interfering with the operation of the Princeton Community Phone Book, and saving lawyers advertising expenses were taken into account.[27] They all unequivocally stated that these topics were not discussed and that such considerations were not factors in the decision. Deposition of Bate at 35,41; Deposition of Capehart at 332-34a; Deposition of Bambrick at 38. Plaintiffs produced no evidence casting doubt on the veracity of these statements.

The only relevant facts established by plaintiffs' attempt to find countervailing evidence of bad faith are that of the 12 members of the Committee who participated in the decision, three (Fienberg, King and Vogt) owned stock in AT&T, two (Bate and Scherer) were members of firms that had represented AT&T or one of its subsidiaries in the past but no longer did so, and two (Geiser and Wharton) were members of firms that represented AT&T or New Jersey Bell in local matters. 211-12a.

26. (Cont'd)
should have been answered, a view rejected by Part C. On the merits of the inquiry, this memorandum reached the same conclusion as did Mr. Capehart's draft opinion and, ultimately, Opinion 290. Deposition of Daniel J. Matyola at 248-49a. Mr. Wharton did not instruct Mr. Matyola as to how to resolve the issue, but simply asked Matyola to research the problem and present his views. *Id.* at 249-50a.

27. No such inquiry was made of Wharton.

We do not think these facts are sufficient to sustain a finding of bad faith or even to raise a genuine issue of material fact in that regard. AT&T was not a party to which the advisory opinion was directed, and therefore Opinion 290 had no direct effect on AT&T. Furthermore, the Opinion could not have had any significant indirect impact on AT&T or the value of AT&T stock. Allowing lawyers to purchase listings in a directory of limited circulation[28] published by a small company would not have had adverse effect on the value of AT&T stock. If plaintiffs believed Opinion 290 had the effect of increasing the value of AT&T stock, they submitted no evidence to support this position for purposes of opposing defendants' motion for summary judgment. And it would appear that such a decision would not have influenced AT&T's choice of Wharton's or Geiser's firms to represent them in local matters or diminished AT&T's ability to pay consel fees to those firms. Therefore, those five committee members having an interest in AT&T could not have gained by the adoption of Opinion 290.[29] Furthermore, of the 12 Committee members who participated in the decision, none of whom dissented, seven had no interest whatsoever in AT&T at the time the decision was made. These seven include the drafter of the Opinion, who reached his result independently of any other Committee members.

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28. The circulation of the Princeton Community Phone Book is limited to the Princeton, New Jersey, area. 336a. Princeton's estimated 1978 population is 13,600. 1978 Commercial Atlas and Marketing Guide 75 (1978).

29. Although we do not consider that there is enough evidence to raise a genuine issue as to defendants' bad faith or malicious intent to injure, we do not necessarily approve what was done here. To avoid any appearance of impropriety, it may have been advisable for the decision-makers having any interest in AT&T or New Jersey Bell to have recused themselves.



Accordingly, in the face of uncontradicted depositions and affidavits that the Committee members acted in good faith, we conclude that the answers to the interrogatories do not raise a material issue of genuine fact on the good faith question. We therefore affirm the district court's order entering summary judgment in favor of the defendants on the damage claim under Section 1983.

## IV.

### THE SHERMAN ACT

Count Two of the complaint alleges that the defendants, acting in concert, restrained trade in violation of Section 1 of the Sherman Act in that Opinion 290 prevented the Princeton Community Phone Book from competing, in listing lawyers, with the directories published by the New Jersey Bell system. The district court granted the defendants' motion for summary judgment on this count on the ground that the nexus between defendants' conduct and interstate commerce was insufficient to confer jurisdiction on the court under the Sherman Act. In this court briefing focused on the issue of whether the Sherman Act claim was barred under the doctrine of *Parker v. Brown,* 317 U.S. 341 (1943), because the adoption of Opinion 290 constituted state action. We hold that the antitrust claim is barred under *Parker.*

In *Parker* the Supreme Court held that the Sherman Act was inapplicable to certain state action.[30] *Parker,* however, is not the last word on the state action exemption, and during the last two years, after 30 years of virtual

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30. The holding of *Parker* is thoroughly analyzed in *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 585-92 (1976). For a discussion of the historical background and origins of *Parker,* see Handler, The Current Attack on the *Parker v. Brown* State Action Doctrine, 76 Colum. L. Rev. 1 (1976). *See also* P. Areeda & D. Turner, 1 Antitrust Law 67-69 (1978); L. Sullivan, Antitrust 732-34 (1977).

silence on *Parker,* the Supreme Court has sought to define the limits and the applicability of the exemption is a series of four cases, two of which concern the regulation of lawyers' conduct. These cases focus on three factors which, taken together, we deem controlling in determining the applicability of the exemption: the status of the defendant vis-a-vis the state, the extent to which the state commands or supervises the activities of the defendant, and the existence and importance of the state policy resulting in a restraint of trade. *See Mobilfone v. Commonwealth Telephone Co.,* No. 77-1585 (3rd Cir., Feb. 8, 1978). This is still a developing area of the law, however, and no simple test for the applicability of exemption emerges from these four cases. Therefore, each case must be discussed to determine the extent to which it controls here.

Plaintiffs rely on *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), in which the Court held that the State Bar, in requiring lawyers to adhere to minimum fee schedules, was not exempt from the Sherman Act. We think that *Goldfarb* is distinguishable and does not compel a similar result in this case.

In *Goldfarb* the Court focused upon the first two interrelated factors: the status of the defendant, primarily the relationship between the defendant and the state, and the activities of the defendant, primarily the extent to which the activity complained of was controlled by state law. The status of the defendants differ in *Goldfarb* and in the present case. The defendant in *Goldfarb* was the Virginia State Bar, an independent association consisting of all lawyers admitted to practice in Virginia. The Virginia Supreme Court made the State Bar an agency of the state for the limited purpose of regulating the practice of law in that state. The members of the State Bar were not appointed by the Virginia Supreme Court justices, or by any other state officials, as agents of the state. In contrast, in



the present case, the Committee was created by the New Jersey Supreme Court and its raison d'etre is to serve the state judiciary. All members of the Committee are appointed by the justices of the New Jersey Supreme Court, and the Committee's functions and jurisdiction are clearly defined by New Jersey Court Rule 1:19. Thus, while for "some limited purposes" the Virginia State Bar was a state agency, *Goldfarb, supra* at 791, the Committee's sole purpose is to act as an agent of the state. Therefore, the Virginia State Bar's status as a state agency is tenuous compared with the Committee's status.[31]

The second focal point of *Goldfarb* also demonstrates its inapplicability here. In *Goldfarb* the State Bar enforced minimum fee schedules despite the fact that there was no Virginia statute or Supreme Court rule authorizing the State Bar to maintain minimum fees. Quite to the contrary, the clear purpose of the fee provisions of the ABA Code of Professional Responsibility adopted by Virginia is to insure that fees are not excessive, not to place an artificial floor under fees.[32] Thus, although it was a function of the Virginia State Bar to regulate fees to prevent them from being excessive, the rule did not contemplate an anticompetitive effect. In contrast, the New Jersey rules regulating publicity by lawyers do contemplate an anticompetitive effect. The rule is subject to different possible interpretations requiring the Committee to draw a line bet-

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31. Plaintiffs suggest that the Committee's status as a state agent is tenuous because the New Jersey Supreme Court does not necessarily approve the Committee's opinions. Indeed, under Rule 1:19 (see part I, par.2, *supra*) lawyers may appeal adverse decisions of the Committee to the New Jersey Supreme Court. This view will not withstand analysis. If a legislature creates a system of courts, it may not approve of the decisions of those courts, but it does not follow that those courts are not state agencies.

32. DR 2-106 provides in part:

"Fees for Legal Services

"(A) A Lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.

ween publicity in acceptable publications and unacceptable publications. As long as such a line must be drawn, an anticompetitive result must follow. For example, if the Committee had allowed listings in the Princeton Community Phone Book but not allowed them in a professional directory published quarterly containing articles, essays, and illistrations, as well as listings, then this latter publication could claim that it was damaged by the anti-competitive effect of the Committee's ruling. Nonetheless, this publication might be more accurately classified as a magazine than as a telephone directory. Thus, although such a publication is not conclusively barred by the literal wording of the rules, under DR 2-101(B)[33] a strong case could be made against its ethical propriety prior to ***Bates***. This illustrates that, although the rules were sufficiently general and vague to leave open who was to suffer the anti-competitive consequences of regulation of publicity

32. (Cont'd)

"(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent."

33. See note 10, *supra*.



by lawyers, they did contemplate some anti-competitive effect. According to the interpretation of *Goldfarb* adopted by this circuit and by the Supreme Court, this contemplated anti-competitive effect is sufficient to distinguish the present case from *Goldfarb*.

In *Duke & Co. v. Foerster,* 521 F.2d 1277, 1280 (3d Cir. 1975), we stated:

> "We read *Goldfarb* as holding that, absent state authority which demonstrates that it is the intent of the state to restrain competition in a given area, *Parker*-type immunity or exemption may not be extended to anti-competitive, government activities. Such an intent may be demonstrated by explicit language is state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity."

In this case there is state authority demonstrating an intent to restrain competition in the area of lawyer's advertising or publicity. This intent "may be inferred from the nature of the powers and duties given to" the Committee. *Id.* Similarly, in *Lafayette v. Louisiana Power & Light Co.,* 46 U.S.L.W. 4265, 4272 (U.S., Mar. 19, 1978), the Supreme Court stated: "[A]n adequate state mandate for anti-competitive activities of ... governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of' 532 F.2d at 434' (footnote omitted). In other words, the state need not have contemplated the precise action complained of as long as it contemplated the kind of action to which objection was made.

*Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976), is distinguishable on the same analysis as *Goldfarb*. In *Cantor,* defendant Detroit Edison gave its customers light

bulbs as part of their electric service, thus according to plaintiff, restraining trade in the sale of light bulbs. The Supreme Court held that Detroit Edison was not exempt from the Sherman Act under the state action doctrine. Focusing on the status of the defendant, the plurality attached great significance to the fact that the defendant was a private party, not a state agency or official. *Cantor, supra* at 591. *Cantor* is clearly distinguishable from the present case in this regard. Turning to the second focal point of *Goldfarb,* the activity of the defendant, the plurality found that the decision to provide light bulbs was primarily that of the defendant, not the Michigan Public Service Commission. The two concurring Justices also noted the significance of the defendant's activities, as opposed to their status. *Id.* at 604 (Burger, C.J., concurring), 613 n.5 (Blackmun, J., concurring). Again, the present case is distinguishable because the decision to regulate advertising and publicity was that of the New Jersey Supreme Court, not the Committee.

There is a third and crucial distinction between this case and *Cantor.* In *Cantor* the Court found that the state had no regulatory interest in distributing light bulbs. *Id.* at 584-85; 604-05 (Burger, C.J. concurring); 612-14 (Blackmun, J., concurring). In contrast the Supreme Court has recognized that "the regulation of the activities of the bar is at the core of the state's power to protect the public." *Bates, supra* at 361. In *Goldfarb, supra* at 792, the Supreme Court stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual



> in the business world may be demoralizing to the ethical standards of a profession.' *United States v. Oregon State Medical Society,* 343 U.S. 326, 336, (1952) ... The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary govermental function of administering justice, and have historically been 'officers of the courts'."

*See also In re Primus,* 46 U.S.L.W. 4519, 4522 (U.S. May 30, 1978); *Ohralik v. Ohio State Bar Assn.,* 46 U.S.L.W. 4511, 4514-15 (U.S., May 30, 1978). Consequently, with regard to all three factors which we have identified as controlling the applicability of the state action exemption, *Cantor* is distinguishable from the present case.

Defendants rely on *Bates,* the third case in the recent state action tetralogy. In *Bates,* the facts of which are discussed in part II-B of this opinion, the Supreme Court unanimously held that the State Bar of Arizona, which enforced a prohibition of lawyers' advertising, was exempt from the Sherman Act. Although the defendant in *Bates* appears to have had a status similar to the defendant in *Goldfarb,* the Court did not sharply distinguish between status and activity, demonstrating that, although these factors are distinguishable analytically, they may be interconnected in fact. Regarding its activity, the defendant in *Bates* was enforcing a clear command of the state pursuant to the Arizona Supreme Court rules prohibiting advertising. Regarding the defendant's activity and status taken together, the Court stated:

> "Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision."

*Bates, supra* at 361. Thus, in *Bates* the crucial point was that the defendant was enforcing a clear command of the state under direct supervision of the state.

Although *Bates* supports the position of the defendants in this case, it differs from this case in a notable respect. Defendants here were not enforcing a clear command of the New Jersey Supreme Court, but were interpretating an unclear command and enforcing their interpretation. However, in contrast to *Bates* and *Goldfarb,* defendants here were acting as part of an agency created by the New Jersey Supreme Court for the sole purpose of serving the state. Thus, while the relationship between the Committee's activity and the command of the state is not as close as that relationship in *Bates,* the relationship between the Committee as an entity and the State Supreme Court is closer here than in *Bates.* Our reading of *Bates* and *Goldfarb* leads us to the following analysis for this type of case. The weaker the relationship between the state and the defendant, the more clearly the state must command the precise action taken by the defendant for the defendant to enjoy the state action exemption. Conversely, the closer the relationship between the state and the defendant, the less clearly the state need command the precise action for the defendant to enjoy the exemption. As noted above, in the latter situation, the state need only authorize action in a particular area. *Louisana Power & Light Co., supra* at 4272; *Duke & Co., supra* at 1280. This analysis is supported by our recent decision in *Mobilfone v. Commonwealth Telephone Co.,* No. 77-1585 (3d Cir., Feb. 8, 1978), in which we stated:

> "[W]e perceive *Cantor, Goldfarb* and *Bates* to teach that in order for the *Parker* rule to apply, the defendant must show that the state has an independent regulatory interest in the subject matter of the anti-trust controversy; that there exists a clear and affirmative articulation of the state's policy with regard to that interest; and that the state supervision is active."

*Id.,* slip op. at 7.[34]



Applying this analysis in the present case, we reiterate that the relationship between the state and the defendant is close, the defendant having been created to act solely as a state agent by the supreme judicial body of the state, and that, althought the defendants' action is not as clearly commanded as was the defendants' action in *Bates,* the state, acting as sovereign, did command the kind of action the defendants took.[35] Therefore, the defendants are enitled to the state action exemption.

Plaintiffs rely on *Lousiana Power & Light Co., supra,* the most recent state action decision, and our analysis will not be complete without a brief discussion of that case. In

34. Commentators have suggested a number of approaches which are consistent with, but not identical to, that taken here. Professors Areeda and Turner state that "there can be no immunity without (1) adequate public supervision and (2) a clear state purpose to displace antitrust law." P. Areeda & D. Turner, 1 Antitrust Law 71 (1978). In Professor Sullivan's view, "state displacement of federal policy will be sanctioned only when the state has made a legislative judgment to adopt a cohesive regulatory program alternative to antitrust and only to the extent needed to give that policy the scope which its alternative philosophy requires." L. Sullivan, Antitrust, 734-35 (1977). According to a third commentator, if the state intent to restrict competition takes the form of an express statutory authorization, the activity should be protected. If the state intent is expressed by a state agency, the activity should be protected if it falls within the scope of the agency's authority. If no state intent can be determined, active state control, supervision, or involvement in the activity would imply such intent, and the activity would be protected. Comment, The State Action Exemption in Antitrust: From *Parker v. Brown* to *Cantor v. Detroit Edison Co.,* 1977 Duke L.J. 871, 908. *See also* Note, *Parker v. Brown* Revisited: The State Action Doctrine After *Goldfarb, Cantor,* and *Bates, 77* Colum. L. Rev. 898, 908-13 (1977), which recognizes that status as a govermental entity is neither a necessary nor sufficient condition for the state action exemption. Under any of the above tests, we think the result we reach would follow.

35. In *Bates, supra* at 359-60, the Court equates a command of the

*Louisiana Power & Light,* the Supreme Court held that cities operating power companies were not exempt from the Sherman Act despite their status as governmental entities. We think plaintiffs' reliance on *Louisiana Power & Light* is misplaced. *Louisiana Power & Light* supports the approach adopted above with focuses on the dual relationship between the state and the defendant and the command of the state and the act of the defendant. The Court stated that the petitioners' status as cities did not automatically afford them the state action exemption, but acknowledged that the cities may be exempt if they are acting "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 4271. In the present case, the Committee bears a closer relationship to the state than do cities and here there was unquestionably a state policy to replace competition with regard to advertising or publicizing legal services with regulation.

The plurality opinion in *Louisiana Power & Light* also requires a defendant to demonstrate that the state policy pursuant to which it acts is sufficiently weighty to override the presumption against implied exclusion from the antitrust laws and the national policies embodied in those laws. *Bates* establishes that the policy of regulating publicity by lawyers carries such weight. *Id.* at 361-62[36].

For the foregoing reasons, we hold that, on the facts of this case, the actions of defendants constitute state actions exempt from Section 1 of the Sherman Act.

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35. (Cont'd)
state supreme court with the command of the state acting as sovereign.

36. Professor Sullivan has framed this issue somewhat differently, as follows: "Assuming an active conflict between antitrust and state regulatory law it becomes essential for the court to decide which policy ought to defer to the other and to what degree." L. Sullivan, Antitrust 737 (1977). In *Bates, supra* at 361-62, the Supreme Court decided that the policy of regulating advertising by lawyers was entitled to deference, at least where damages were sought. *See also* Note, Colum. L. Rev., *supra* note 34, at 921-33.



The judgment of the district court will be affirmed in part and reversed in part and the case remanded for action consistent with this opinion as summarized in the last sentence of the first paragraph of this opinion.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit.*

## APPENDIX B

## UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY
CHAMBERS OF GEORGE H. BARLOW, JUDGE
FEDERAL BUILDING
TRENTON, NEW JERSEY 08605

May 6th, 1977

*NOT FOR PUBLICATION*

Harvey Weissbard, Esquire
Messrs. Isles & Weissbard
55 Park Street
Montclair, New Jersey 07042
(Attorneys for Plaintiffs)

John W. Boyd, Esquire
Messrs. Freedman, Boyd & Daniels
505 Roma NW
Albuquerque, New Mexico 87102
(Attorneys for Plaintiffs)

Paul G. Levy, Esquire
Assistant Attorney General
State of New Jersey
State House Annex
Trenton, New Jersey 08625
(Attorney for Defendants)

*OPINION*
*(filed May 9, 1977)*

RE: THE PRINCETON COMMUNITY PHONE BOOK, INC. and JOSEPH M. BOYD v. FRANK L. BATE, Esq., BLANE E. CAPEHART, Esq., BERNARD FEINBERG, Esq., THEODORE W. GEISER, Esq., WILLIAM J. HUGHES, Esq., VICTOR R. KING, Esq., HOWARD G. KULP, JR., Esq., ABRAM A. LEBSON, Esq., ROBERT J. McCURRIE, Esq., DANIEL J. O'HERN, Esq., EVERETT M. SCHERER, Esq., SEYMOUR A. SMITH, Esq., EDWARD L. C. VOGT, Esq., EDWARD L. WEBSTER, JR., Esq., and T. GIRARD WHARTON, Esq., Individually and as Members of the Advisory Committee on Professional Ethics of the New Jersey Supreme Court. (Civil Action No. 75-881.)



---

Gentlemen:

The plaintiffs in this action are the publishers of The Princeton Community Phone Book, a private telephone directory. The defendants are members of the Advisory Committee on Professional Ethics (the Committee), appointed by the Supreme Court of New Jersey pursuant to N.J.R. 1:19-1. Responding to an inquiry made by a member of the State Bar, the Committee issued Opinion No. 290, which held that it would be ethically inappropriate for New Jersey attorneys to purchase listings in the plaintiffs' directory.

Thereafter, the plaintiffs commenced this action pursuant to the Civil Rights Act, 42 U.S.C. Section 1983, the Sherman and Clayton Acts, 15 U.S.C. Sections 1, 15, and the New Jersey Anti-Trust Act, N.J. Stat. Ann. 56:9-10(b), 56:9-12(a). The plaintiffs seek damages as well as declaratory and injunctive relief.

In April, 1976, the Committee suspended the effect of Opinion No. 290, pending a possible revision of certain Disciplinary Rules by the New Jersey Supreme Court.

This matter is currently before the Court on cross-motions for summary judgment.

*Civil Rights Act*

The defendants contend that they are absolutely immune from personal liability for damages in suits brought under the Civil Rights Act and rely primarily on the holding in *Pierson v. Ray,* 386 U.S. 547 (1967), to support that position. *Pierson* made it clear that members of the judiciary have "immunity from damages for acts committed within their judicial jurisdiction". *Id.* at 544. The defendants argue that this immunity extends to them because of their status as judicial appointees. The plaintiffs concede that this immunity may also reach judicial appointees, Plaintiffs' Brief at 11, but would limit the scope of this protection to those persons whose functions stem *directly* from the judicial administration of civil or criminal cases.

Although, on its face, *Pierson* does not extend its immunity to persons other than actual members of the judiciary, it is clear that this immunity was not meant to be so restricted. There are many cases which have extended this immunity to those persons or bodies which function in a quasi-judicial role as a so-called arm of the judiciary. *See, e.g., Ginger v. Circuit Court for the County of Wayne,* 372 F.2d 621, 625 (6th Cir. 1967) (immunity for state bar association and individual members of its grievance committee); *Clark v. State of Washington,* 366 F.2d 678, 681 (9th Cir. 1966) (immunity for state bar association); *Byrne v. Kysar,* 347 F.2d 734, 736 (7th Cir. 1965) (immunity for individual members of medical commission appointed by court to assist in determining plaintiff's mental health); *Bartlett v. Weimer,* 268 F.2d. 860, 862 (7th Cir.) (*cert. denied,* 361 U.S. 848 (1959)) (immunity for court-appointed physician); *Dacey v. New York County Lawyers' Association,* 290 F. Supp. 835, 842 (S.D.N.Y. 1968) (immunity for state bar association); *cf. Feldman v. State Board of Law Examiners,* 438 F.2d 699, 705 (8th Cir. 1971) (immunity for Board of Law Examiners suggester as possibly meritorious) (dicta).



Here, the defendants derive their authority from the New Jersey court rules. Their functions are, therefore, delegated directly by the Supreme Court of New Jersey. This Committee, through its individual members, provides assistance to the Supreme Court by regulating the ethics of members of the legal profession. As such, the defendants must be viewed as an integral part of the judicial process. Because of this relationship between the Supreme Court and the Committee, we conclude that the individial members of the Committee, when engaged in Committee functions, enjoy the same immunity -- certainly in terms of their opinions -- from damage suits under the Civil Rights Act as do members of the judiciary. The Committee, as the courts, must be able to perform its duties unhampered by the fear that a citizen, aggrieved by an opinion rendered by the Committee, will choose to express himself by initiating a lawsuit against the Committee members. Accordingly, the defendants motion for summary judgment as to the plaintiffs' Section 1983 claims is granted.

*Sherman Act*

Count II of the complaint alleges that by issuing their opinion the defendants violated Section 1 of the Sherman Act by blacklisting the plaintiffs, for the opinion had the effect of coercing "lawyers in the State of New Jersey who are subject to threatened disciplinary action, to boycott and otherwise refuse to deal with plaintiffs". Complaint at paragraph 15. As a result, the plaintiffs allege they have "lost revenues, [have had their] ability to compete effectively impaired and [have] suffered a substantial reduction in [their] good will". *Id.* at paragraph 17. However, before this Court will entertain the above allegations, it must appear that we are vested with jurisdiction over the instant subject matter, a requirement which the defendants argue is absent here.

The Sherman Act prohibits every contract, combination or conspiracy "in restraint of trade or commerce among the several states", 15 U.S.C. Section 1. This interstate commerce requirement serves "as a limitation on Sherman Act complaints". *Doctors, Inc. v. Blue Cross of Greater Philadelphia,* 490 F.2d 48, 54 (3rd Cir. 1973). While the Third Circuit in *Doctors, Inc., supra,* recognized that there exists no convenient test with which to establish the presence or absence of the interstate commerce requirement, it did require the plaintiff there to show either that (1) the alleged anticompetitive activities were conducted "in the flow of interstate commerce, or (2) activities which though occuring purely on a local level substantially affect interstate commerce". *Id.* at 50. Thus, there must be a sufficient nexus between the alleged illegal acts and interstate commerce in order to confer jurisdiction on this Court. In *Hospital Building Co., v Trustees of the Rex Hospital,* 425 U.S. 738 (1976), the Supreme Court framed this nexus requirement in the following terms: "[T]he restraint in question [must] 'substantially and adversely [affect] interstate commerce' ". *Id.* at 743 (quoting from *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 195 (1974). In the words of the Court, interstate commerce must "[feel] the pinch", *United States v. Women's Sportswear Assn.,* 336 U.S. 460, 464 (1949).

It is clear to us that the defendants' alleged illegal conduct (issuing Opinion No. 290) was not an act which itself occurred in interstate commerce. Thus, the Committee's ban on attorneys' listings in the plaintiffs' directory must have had adverse and substantial effect on interstate commerce in order to support the plaintiffs' Sherman Act claims. *Hospital Building, supra.*

Relevant to this interstate commerce requirement, the plaintiffs have submitted the following information to the Court:



(1) The plaintiffs' directory is printed in Pennsylvania and shipped to New Jersey;

(2) The plaintiffs' directory solicits and receives classified advertisements from businesses whose products are in the flow of interstate commerce;

(3) The plaintiffs' directory is in direct competition with that published by the New Jersey Bell Telephone Company, which also carries classified advertisements from businesses whose products are in the flow of interstate commerce; and

(4) The New Jersey attorneys who removed their paid listings from the plaintiffs' directory conduct business in interstate commerce.

Based on the above facts, the plaintiffs would find the interstate commerce requirement of Section 1 to be satisfied; their argument is essentially as follows: Since the directory is an article of interstate commerce by virtue of its Pennsylvania printing and its "national" advertising, the refusal of local attorneys to purchase telephone listings in the directory, coupled with the possibility that businesses in interstate commerce may withdraw their commercial advertising from the directory upon learning of the delisting of the Princeton area attorneys, has enough of a prospective effect on interstate commerce to sustain Section 1 jurisdiction.

We cannot agree with this view of Section 1 jurisdiction. While the plaintiffs have shown that the directory is involved in interstate commerce, this alone falls short of meeting the "nexus" requirement of *Hospital Building.* Nor have the plaintiffs come forward with any factual basis for the speculative position that the directory's commercial advertising would suffer as a result of the pro-

mulgation of Opinion No. 290. Of more than passing interest is the fact that in the plaintiffs' complaint there is no allegation of the amount of damages incurred by the plaintiffs. However, the plaintiffs did note that they wished to "amend their Complaint by alleging the amount of such damages when such has been ascertained". Complaint at paragraph 17. Nevertheless, although discovery in the instant matter has been completed, the plaintiffs have failed to bring to Court's attention the nature of the damages allegedly suffered. The motivation for the plaintiffs' silence on this matter may be explained by the fact that the classified section of the 1976 directory was not devoid of an attorney listing. In fact, the plaintiffs decided to list the attorneys free of charge so as to avoid the effect of Opinion No. 290.

In view of this fact, the argument that the plaintiffs' business would suffer following the failure of the attorneys appearing in the 1975 directory to renew their paid classified advertisements must be viewed as unfounded except as to the loss directly attributable to the attorneys' own cancellation. Thus, the instant dispute actually must be narrowed to the question of whether the loss of revenue from the delisting of the forty-five (45) Princeton area attorneys who paid for advertising in the 1975 directory can suffice to uphold our jurisdiction. The answer, most assuredly, must be in the negative, for whatever effect this may have on interstate commerce is *de minimis.*

Nor could the jurisdiction of this Court be invoked by a showing that business losses were suffered following the delisting by any of the forty-five (45) attorneys who advertised in the 1975 directory. Certainly such monetary injuries would be personal to those attorneys and, therefore, the plaintiffs would have no standing under Section 4 of the Clayton Act to assert such claims.



Finally, we cannot accept the argument that the plaintiffs' position as a direct competitor with the New Jersey Bell Telephone Company in any way would convert the instant matter into one cognizable under Section 1 of the Sherman Act.

Thus, this Court concludes that the nexus between the defendants' conduct and interstate commerce is insufficient as a matter of law to enable us to assume jurisdiction of the Sherman Act claims. Accordingly, the defendants' motion for summary judgment is granted as to Count II of the complaint.

*State Antitrust Claim*

In Count III of the complaint, the plaintiffs allege that defendants acted in violation of the New Jersey antitrust statutes. Our authority to entertain such claims would be pursuant to the pendnet jurisdiction of this Court. Since we have granted summary judgment in favor of the defendants as to each of the federal claims asserted by the plaintiffs, we may not permit the state claim to survive in this Court. As the Supreme Court noted in *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966):

> Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

*Id.* at 726 (footnote omitted).

Accordingly, the plaintiffs' state claims are hereby dismissed. FED. R. CIV. P. 12(h) (3).

An appropriate order will be submitted by the defendants.

Very truly yours,

George H. Barlow
United States District Judge

Appendix 38

**UNITED STATES DISTRICT COURT**
DISTRICT OF NEW JERSEY
CHAMBERS OF GEORGE H. BARLOW, JUDGE
FEDERAL BUILDING
TRENTON, NEW JERSEY 08605

May 31st, 1977

*NOT FOR PUBLICATION*

Harvey Weissbard, Esquire
Messrs. Isles & Weissbard
55 Park Street
Montclair, New Jersey 07042
(Attorneys for Plaintiffs)

John W. Boyd, Esquire
Messrs. Freedman, Boyd & Daniels
505 Roma NW
Albuquerque, New Mexico 87102
(Attorneys for Plaintiffs)

*OPINION (ADDENDUM)*

Paul G. Levy, Esquire
Assistant Attorney General
State of New Jersey
State House Annex
Trenton, New Jersey 08625
(Attorney for Defendants)

RE: THE PRINCETON COMMUNITY PHONE BOOK, INC. and JOSEPH M. BOYD v. FRANK L. BATE, Esq., BLANE E. CAPEHART, Esq., BERNARD FEINBERG, Esq., THEODORE W. GEISER, Esq., WILLIAM J. HUGHES, Esq., VICTOR R. KING, Esq., HOWARD G. KULP, JR., Esq., ABRAM A. LEBSON, Esq., ROBERT J. McCURRIE, Esq., DANIEL J. O'HERN, Esq., EVERETT M. SCHERER, Esq., SEYMOUR A. SMITH, Esq.,

Appendix 39

EDWARD L. C. VOGT, Esq., EDWARD L. WEBSTER, JR., Esq., and T. GIRARD WHARTON, Esq., Individually and as Members of the Advisory Committee on Professional Ethics of the New Jersey Supreme Court. (Civil Action No. 75-881.)

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Gentlemen:

The following language should be inserted following paragraph 2 on page 3 of the Court's opinion filed May 9th, 1977, in the above-entitled matter:

Additionally, we note again that Opinion No. 290 had been operationally suspended by order of the Supreme Court of New Jersey. 99 N.J.L.J. 329 (April 22, 1976). Thus, this Court regards the plaintiffs' application in Count I of the complaint for injunctive and declaratory relief to be moot.

Very truly yours,

George H. Barlow
United States District Judge

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

| | |
|---|---|
| THE PRINCETON COMMUNITY PHONE BOOK, INC., et al., | ) Civil Action File No. 75-881 (Barlow) |
| Plaintiffs, | ) |
| v. | ) FINAL JUDGMENT |
| FRANK L. BATE, ESQ., et al., | ) |
| Defendants. | ) |

This action being presented to the Court on cross motions for summary judgment, Hon. George H. Barlow, presiding, and all issues having duly been argued and heard and a written decision having been duly rendered on May 6, 1977,

It is ORDERED and ADJUDGED on this 31st day of May, 1977 that defendants' motion for summary judgment on Count I and Count II of the Complaint is granted and Count III of the Complaint is dismissed for lack of jurisdiction pursuant to Rule 12(h) (3), and plaintiffs' motion for summary judgment is denied.

GEORGE H. BARLOW, U.S.D.J.



**APPENDIX C**

**ADVISORY COMMITTEE ON PROFESSIONAL ETHICS**

**Appointed by the Supreme Court of New Jersey**

**Opinion No. 290**

*Advertising*
*Classified Listing in*
*Community Directory*

An attorney has received a communication from Princeton Community Phone Book, Inc. offering to list the name, address and office telephone number of the attorney in the classified pages of its publication, known as Princeton Community Phone Book, under a classification entitled "Lawyers" for a charge of $45 per year. The Princeton Community Phone Book consists of an alphabetical section and a classified section not unlike the directory published and distributed by the New Jersey Bell Telephone Company. It has been published and distributed annually free of charge to residents and business people in Princeton and vicinity for 13 years.

The Committee secured a copy of the 1972 and 1974 editions of The Princeton Community Phone Book. In the 1972 edition on page 18 of the classified section there appears *"ATTORNEYS - See Lawyers"*. On page 80 between *"LAWN MOWERS"* and *"LEATHER GOODS"* no lawyers are listed. However, on page 71 of the 1974 edition under the heading "LAWYERS" (partial listing) there appear the names of several lawyers, their office addresses and telephone numbers.

Significantly, on page 129 of both editions entitled "Table of Contents" there appears the following paragraph:

"DISTRIBUTED ANNUALLY FREE OF CHARGE - on or about October 1st each year - with the compliments of the Publisher and participating *advertisers* to residents and business people in Princeton and vicinity. *(Guaranteed minimum circulation: 20,000 copies)* Residents of the Princeton Community are listed free of charge." (Emphasis added)

The Table of Contents (page 129) also contains a paragraph setting forth "Advertising Terms and Conditions."

The origin of the proscription of advertising and solicitation by lawyers is discussed at length in *Drinker, Legal Ethics* (1953) 246. The subject has been considered by this Committee in several earlier opinions, *viz, Opinions* 30, 87 *N.J.L.J.* 106 (1964); 46, 87 *N.J.L.J.* 449 (1964); and 58, 87 *N.J.L.J.* 741 (1964) which we now reaffirm. These opinions are consistent with and supported by *Informal Opinions* 456 and 457 (1961) of the American Bar Association, Committee on Professional Ethics in which it was determined that an attorney may not pay a fee to be listed in a Chamber of Commerce directory (or in the classified section of a community directory) that lists business concerns and professional men.

The Committee is not unmindful of the provisions of *DR* 2-102(A) (5). However, it was not the intent of that rule to permit an attorney to become an "advertiser" and to pay for a listing in a city directory which has a "guaranteed minimum circulation: 20,000 copies." It is the opinion of the Committee that the purchase of a classified listing in an advertising directory (such as The Princeton Community Phone Book) is ethically not acceptable.

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